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No. 98-347

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

JAMES T. GOLDSMITH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent opposes certiorari in this case solely on the ground that, in his view, the Court of Appeals for the Armed Forces correctly asserted jurisdiction in this case and correctly invalidated an Act of Congress giving the President authority to drop convicted officers from the rolls. A constitutional holding that strips the President of authority given by Congress to enforce personnel standards in the military, however, raises a question that clearly merits this Court's attention. That is particularly so where the expansive theory of jurisdiction invoked by the lower court to reach that constitutional issue has significant ramifications for

military justice. Respondent's defense of the court of appeals' decision, moreover, is unsound.

1. On the threshold question whether the court of appeals had jurisdiction under the All Writs Act in this case, respondent argues (Br. in Opp. 3) that the court of appeals properly exercised power to "insure that only the adjudged and affirmed original sentence was carried out." He contends (*id.* at 7) that an action to drop him from the rolls falls within the court's authority because that action "affected and increased the punishment imposed by the decision of the court-martial."

That theory fails to explain how the court of appeals' intervention was "necessary or appropriate in aid of" (28 U.S.C. 1651(a)) its limited jurisdiction, *i.e.*, to review the findings and sentences of a court-martial conviction. See 10 U.S.C. 867. The Air Force's administrative action to drop respondent from its rolls was not part of the sentence imposed by respondent's court-martial. Indeed, the action to drop him from the rolls was commenced only after respondent's conviction had become final and no longer subject to review.[1] A significant sign of how far beyond its limited sphere of reviewing courts-martial convictions the court traveled is that its writ in this case purports to bar action by individuals, such as the President, who were not even parties to the court-martial.

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[1] Respondent therefore mistakenly relies (Br. in Opp. 5) on decisions recognizing that writs may be issued in aid of a court's pending or potential appellate jurisdiction. See, *e.g.*, *Adams* v. *United States*, 317 U.S. 269, 273 (1942); *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1004-1005 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964). No such pending or potential case on appeal existed, apart from the application for the extraordinary writ itself.

Respondent also relies (Br. in Opp. 4-7) on previous decisions of the court of appeals for the proposition that it may invoke the All Writs Act "to achieve the ends of justice by overseeing the administration of justice in the United States Armed Forces." *Id.* at 5; see also Pet. App. 5a n.3 and Pet. 10-11 (listing cases). That pattern of decisions, however, cannot confer jurisdiction where none exists. Nor, contrary to respondent's assertion (Br. in Opp. 5), did this Court in *United States* v. *Augenblick*, 393 U.S. 348 (1969), "endorse[]" *United States* v. *Bevilacqua*, 39 C.M.R. 10, 11 (1968), in which the Court of Military Appeals considered an application for a writ of coram nobis to challenge a court-martial conviction that was not subject to appellate review under 10 U.S.C. 867. In *Augenblick*, the Court reserved the question whether the Court of Claims could collaterally review a court-martial conviction and held that the Court of Claims erred in its ruling on the merits. 393 U.S. at 351-352. The Court also observed that the Court of Military Appeals "apparently" could have reviewed the defendant's challenge to his conviction under *Bevilacqua*. *Id.* at 350. The Court did not, however, indicate its approval of *Bevilacqua*, which at that time was not, in any event, subject to this Court's review. Military Justice Act of 1983, Pub. L. No. 98-209, § 10(a)(1), 97 Stat. 1405 (codified at 28 U.S.C. 1259 (Supp. II 1984)). Finally, *Bevilacqua* did not even mention the All Writs Act, and this Court has noted in subsequent cases the "conceptual difficulty" with the court of appeals' exercise of jurisdiction outside "appeals from court-martial convictions" under 10 U.S.C. 867. *Parisi* v. *Davidson*, 405 U.S. 34, 44 (1972); see also *Noyd* v. *Bond*, 395 U.S. 683, 695 n.7 (1969).

2. On the merits, respondent argues (Br. in Opp. 10-13) that Congress intended an action to drop an officer from the rolls to be a penal proceeding, because the same statute that amended Section 1161(b) and added Section 1167 "enacted *in pari materia*" provisions that amended Article 57(a) and added Article 58b to the Uniform Code of Military Justice. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tits. V, XI, §§ 563(a)(1)(A) and (b)(1), 1121, 1122, 110 Stat. 325, 462-463.[2] Relying on the court of appeals' decision in *United States* v. *Gorski*, 47 M.J. 370 (1997), which held that Articles 57(a) and 58b are punitive measures, respondent contends (Br. in Opp. 12) that Sections 1161(b) and 1167 similarly impose "criminal punishments beyond the adjudged court-martial sentence."

Respondent is mistaken. Congress enacted all four provisions pursuant to the National Defense Authorization Act for Fiscal Year 1996. That Act spans 517 pages in the *Statutes at Large* and addresses in 57 separate Titles a variety of unrelated issues affecting the Department of Defense, such as procurement, health care, departmental organization and management, and national security policy. In Title V of the Act, which is entitled "Military Personnel Policy," Congress amended Section 1161(b) and enacted Section 1167. Pub. L. No. 104-106, §§ 501-574, 110 Stat. 290-356. By contrast, Articles 57(a) and 58b were enacted as part of Title XI, which contains amendments to the Uniform Code of

[2] Article 58b mandates the forfeiture of military pay following a prescribed court-martial sentence of a servicemember, and Article 57(a) alters the effective date of any forfeiture of pay or reduction in grade that is included in a court-martial sentence of a servicemember. See 10 U.S.C. 857(a), 858b (1994 & Supp. II 1996).

Military Justice. Pub. L. No. 104-106, §§ 1101-1153, 110 Stat. 461-468. Accordingly, Congress's intent in amending the Uniform Code of Military Justice has no bearing on Congress's intent in amending the military's personnel policies. To the contrary, by placing the amendment to Section 1161(b) and the newly enacted Section 1167 in Chapter 59 of Title 10 of the U.S. Code, which is entitled "Separation" and concerns military personnel matters, Congress indicated its intent simply to broaden an existing civil procedure for dropping officers from the rolls when they have committed a serious crime. See Pet. 2-3, 15-16.

Respondent also argues (Br. in Opp. 9-10) that an action to drop him from the rolls is "clearly penal" because it is premised on his court-martial conviction. But Congress may impose both a criminal and civil sanction with respect to the same underlying conduct. *Helvering* v. *Mitchell*, 303 U.S. 391, 397-398 (1938). An officer's criminal conviction may result in a variety of adverse collateral consequences that serve civil remedial goals, such as separation from service, revocation of a security clearance, or non-selection for promotion. The fact that those personnel actions follow a criminal conviction does not transform those remedial actions into criminal penalties. See *Koon* v. *United States*, 518 U.S. 81, 110 (1996) ("[M]any public employees are subject to termination and are prevented from obtaining future government employment following conviction of a serious crime, whether or not the crime relates to their employment."); 10 U.S.C. 504 (generally barring felons from enlisting in the military); cf. *DeVeau* v. *Braisted*, 363 U.S. 144, 159-160 (1960) (plurality opinion) (noting federal and state governments' "wide utilization of disqualification of convicted felons for certain employments closely touching the public interest" and

rejecting *ex post facto* challenge to New York's bar of ex-felons from union office).

Respondent contends (Br. in Opp. 12-14) that an action to drop an officer from the rolls punishes the officer by depriving him of military pay and veterans' benefits.[3] Under this Court's decision in *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997), the relevant question is not whether a sanction "could * * * be described as punishment," but rather whether it is *criminal*, either by legislative intent or by a punitive purpose or effect that clearly negates the legislature's intent to impose a civil remedy. The loss of pay and benefits resulting from an action to drop from the rolls is indistinguishable in purpose and effect from the loss of pay or benefits that may result from any involuntary termination of employment from the military, including termination because of a defective enlistment, medical necessity, non-performance of military duty, or misconduct that is not a criminal offense. See 32 C.F.R. Pt. 41, App. A; 38 C.F.R. 3.12. In none of those instances is the loss of pay or benefits akin to criminal punishment. *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960) (rejecting *ex post facto*, bill of attainder, and Sixth Amendment challenges to provision terminating Social Security benefits of deported aliens because "the sanction is the mere denial of a noncontractual governmental benefit" that imposes "[n]o affirmative disability or restraint," and "certainly nothing approaching the 'infamous punishment' of imprisonment"). Even where a criminal

[3] Under 38 C.F.R. 3.12(k)(3), an officer who is dropped from the military's rolls may be denied veterans' benefits if the "facts and circumstances surrounding separation" do not support the conclusion that the separation "was under conditions other than dishonorable."

conviction forms the basis of an adverse personnel action, the resulting loss of pay and benefits furthers legitimate remedial goals and does not constitute a criminal penalty. See *Peeler* v. *Heckler*, 781 F.2d 649, 652 (8th Cir. 1986) (provision denying Social Security benefits to convicted felons does not impose *ex post facto* criminal punishment "since there is a rational connection between the provision and the non-punitive goal of regulating the distribution of disability benefits"); accord *Jensen* v. *Heckler*, 766 F.2d 383, 386 (8th Cir.), cert. denied, 474 U.S. 945 (1985).

3. Finally, respondent contends that the court of appeals' decision is entitled to deference because it addresses matters "peculiar to the military branches." Br. in Opp. 15 (citing *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976)). This Court, however, exercises plenary review over constitutional issues that arise within the military justice system. See, *e.g.*, *United States* v. *Scheffer*, 118 S. Ct. 1261, 1269 (1998) (reversing court of appeals' holding that exclusion of polygraph evidence in court-martial proceedings under Military Rule of Evidence 707 violated the Constitution); *Middendorf*, 425 U.S. at 43-48 (not deferring to court of appeals' holding that Sixth Amendment requires counsel in summary courts-martial). The Court also has plenary authority to declare the proper interpretation of the All Writs Act; that is not an issue peculiar to the military. Because the court of appeals' jurisdictional and constitutional holdings transcend the military context, they warrant independent review by this Court.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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